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88-No. 1591

In the Supreme Court

OF THE

United States

SANTA FE PACIFIC REALTY CORPORATION,
a Delaware Corporation,
Petitioner,

vs.

CITY OF BERKELEY,
a Municipal Corporation,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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United States District Court

Northern District of California

Before: The Honorable Marilyn Hall Patel, Judge

No. C 87-0804 MHP

Santa Fe Land Improvement Company,
A California Corporation,
Plaintiffs,

vs.

City of Berkeley, A Municipal Corporation,
Defendant.

San Francisco, California

Monday, August 3, 1987 11:38 A.M.

The Clerk: Civil 87-0804, Santa Fe Land Improvement Company versus City of Berkeley, et al.

Mr. Mulcare: Good morning, your honor. Ron Mulcare for plaintiff Santa Fe.

The Court: And you are the attorney who is going to be heard on the motion?

Mr. Mulcare: Yes, that's correct, your honor.

The Court: Thank you.

Mr. Weinberger: Mark Weinberger for the City of Berkeley.

With me are Fran Layton and Clement Shute.

The Court: And you're going to be heard on the motion?

Mr. Weinberger: Yes, your honor.

Mr. Mulcare: The accompanying plaintiff's counsel are Fred Caploe and Ben Salvaty.

Mr. Caploe: Good morning, your honor.

Mr. Salvaty: Good morning, your honor.

The Court: Good morning.

There is no dispute, is there, that since the most recent—well, Measure Q and ordinance, there have been no applications made to the City of Berkeley; is that correct?

Mr. Mulcare: There have been no applications since Measure Q, your honor, that's correct.

We, for various reasons, believe that such is not appropriate and that Q was responsive to our six applications earlier.

The Court: Do you think that might be a little gun-shy after *Kinzli* and not make you go back and go through the motions at least?

Mr. Mulcare: No, I don't believe so.

I believe *Kinzli* is totally different, your honor, and I'll explain why. And I'm aware of the fact that your honor may well know the *Kinzli* case better than I, but that is from the trial standpoint.

The Court: I hope so, painfully so.

Mr. Mulcare: In *Kinzli*, your honor, there were various general zoning impositions made by Santa Cruz upon that property. They allowed for timber harvesting, housing, and a variety of other uses, including agricultural, as I recall, recreational uses.

That zoning was applied to many properties, including the *Kinzli* property. It wasn't just targeted at one property.

In that case, there were no applications made that were of a meaningful nature. The court indicated there was one application made by an option holder which was subsequently withdrawn and never pursued.

In our case, your honor, we believe that we have a totally different situation. We made six applications over a four-and-a-half year period of time, spent some four and a half million dollars pursuing those applications.

Those applications were quite specific. They went to our property, and they were for development of that property. Those applications were rejected by the city. In addition, the city considered some 29 other proposals for the use of our property, solely for our property.

The result of all of this, your honor, the result of our applications, in fact, is Measure Q, which is very, very specific.

I think your honor perhaps was bored in reading all the detail that goes into Q and how it operates, but in any event, I think everything was determined in Q right down to the 690 parking spaces. The only thing not determined is the color of the paint between the spaces.

We believe that—and may I point out that in addition to Q, which imposes the 565,000 square foot limit, which of course would be the intensity of development required under *MacDonald*, as defined, I belive that the uses, or the type development, is defined in Q in that it incorporates the uses of the specific plan. In fact, we gave you Exhibit B, which shows exactly what happens on the property.

I point out to the court that the city rejected proposals by its own consultant to allow development of 575,000 square feet—in other words, only 10,000 square feet more than what was in Q and an earlier proposal by its own consultant of 505,000 square feet.

At this point, your honor, I believe that it would be quite futile to apply for any further applications. And the result we do have is Q, which revolved from our applications.

According to the city's logic, you just keep applying. In other words, you apply. Q comes down—we applied six times. According to the city, when Q comes down, then you apply again.

What will they say after that, apply again? I think there has to be a practical end to this.

The Court: I'd like to hear an answer to that.

What reasonable expectations may there be at this point as to what can possibly happen after Measure Q?

Mr. Weinberger: Your honor, thank you.

Let me march through this a little bit and try to put it in the city's perspective.

The point is that there is a clear distinction between the planning process that the city has gone through since January of

1984 culminating in the actions that it took in November and October of 1986 and the application process that specified in state law and specified in the specific plan itself. There is an application process.

State law requires—this is under the permit streamlining act in the government code—it requires the city to take action within one year maximum after an application has been completed and submitted to the city.

The city has every intention of meeting the one-year deadline in the action, based upon an application as soon as Santa Fe submits it.

The construction of the matter is the city's opportunity to apply the detailed laborious time consuming end—and as both sides will tell you, expensive for both parties—planning process that we have gone through. The application isn't an empty formality that is going to lead to a rubber stamp at the end, and there are several reasons for that.

First of all, the whole structure of the process comtemplating the application, as I say, so that the city has before it the specific development proposal that Santa Fe intends to pursue.

That is, under the applicable zoning, where is it going to place its buildings, site plan—from the standpoint of site plan, what kinds of hotel use does it contemplate?

There's a broad range of hotels that might be built. That is, a particular intensity that—further, there is the question of what retail uses that Santa Fe may wish to bring forward.

There is the question of timing. We don't know today whether Santa Fe is going to come in next week or whether Santa Fe may wait for reasons that are for its own good purposes for five years to bring its application in.

We pointed out in the brief, for example, that there are substantial Caltrans-related freeway and near freeway improvements that have to be made before a major development can go in in that area.

There are certain substantial improvements that are specified to be made by the landowner if the landowner is going to develop the property in advance of the Caltrans making the improvements itself under its own capital program.

The point of all of these is that each of those factors can, to a great degree, affect the economic viability, if you will, to use one of the phrases used by the Supreme Court—the economic viability of Santa Fe's development when it comes in.

The City went through this process for three years, as we've described. It has the difficult job of accommodating both the environmental constraints for a unique piece of property, while at the same time recognizing that it must provide an adequate economic return to the plaintiff, to the landowner.

The City believes, after having put a great deal of time and effort into the process, that it has come up with a development plan which is economically feasible. It stands on its plan, obviously.

It wants to go through the application process and test it. It wants to have Santa Fe come in with its application, and if it's proven wrong, if, despite all of the efforts that the City has gone through, to result in a plan that it believes is—meets both of the constraints that it was under. If it doesn't meet it, hypothetically, the City obviously has to respond at that point.

There's a process that's been set forth. And let me explain it very briefly.

It's the so-called savings clause, Section 5 of the Measure Q. When the City Council placed Measure Q on the ballot—and this was a city council-originated initiative that it placed before the voters—when it put that provision before the voters, it included Section 5.

Section 5 provides that no action of the City shall result in a—in effect in a taking of the land owner's property. The—

The Court: What is the effect of that, however, when that very same measure, as you point out, placed on the ballot by the

city council, provides that it may not be amended or repealed except by vote of the people?

What authority does that give or leeway does that give to the city or to the planning commission to, for example, for any variances or take any action that is not specifically detailed and permitted by the ordinance.

Mr. Weinberger: On advice of counsel to the city, the city understands well, and the city's intention—the city council's intention in putting Measure Q on the ballot is to assure that the end product of the planning process followed by the application process is going to result in an environmentally beneficial and an economically beneficial project from the landowner's standpoint.

So the end product will—remember, we're dealing with a whole series of hypotheticals: An application, an application that is followed by the normal give and take that this court recognized and the Ninth Circuit recognized in *Kinzli*, the negotiation, the give and take, the review of the specific project. That may very well result in a resolution of this entire controversy. It may. And that's the whole purpose of the ripeness doctrine.

But if not, working through this series of hypotheticals, the city is prepared—I can represent to the court—to take the necessary action.

Now, it's not at all clear, for instance, that the city electorate would have to vote necessarily on revisions to the specific plan and the waterfront plan, the general plan.

Let me explain the reason, just briefly. There is no doubt under the state government law that the city council remains free at any time to amend its specific plan or its general plan.

The impediment that's raised here by your honor is the presence of the provision that reads that the city may not amend those provision in the two planning documents without a further vote of the people; however, immediately in the same ordinance is the provision that states that Measure Q may not be enforced in such a way as to effect a taking.

If it is the conclusion—if it is the conclusion—and we seriously doubt it will in light of the economic studies that the city's prepared and the posture that it took, knowing that litigation was likely to ensue, given Santa Fe's posture, we were—the city is prepared, if necessary, to consider whether it may, in effect, amend those provision in the absence of voter approval if the contrary step, the failure to amend them, would result in a taking.

The Court: Let me ask you this: Is there any dispute about the fact that prior to Measure Q, Santa Fe did make six applications or several applications at least?

Maybe there's a dispute as to the number.

Mr. Weinberger: The court's initial question didn't give me an opportunity to respond to Mr. Mulcare's statement at the outset.

A few quick points: Number one, the fact that we're dealing with a single property that, as plaintiff has repeatedly stated in its complaint and papers, that this regulation is targeted solely at Santa Fe is legally, and indeed factually, irrelevant.

The point is this is the remaining piece of undeveloped waterfront property, a unique piece of property. I don't think anyone can dispute that.

The fact that the city prepared a specific plan is exactly what state law contemplates when it comes to major pieces of undeveloped property. You don't take them up piecemeal. You take up an undeveloped piece of property as a whole.

Second, your honor, we did respond in the reply brief to this question of, quote, "applications." First of all, I'm not quite sure where the number six comes from, but I do know this. The responding papers of the plaintiff listed several proposals that it made during the planning process.

These were not applications, your honor. These were tossed into the hopper for consideration along with other proposals received from members of the Berkeley community, people outside the Berkeley community, for potential planning results.

And at least two and possibly three of the, quote, "applications" that Santa Fe made were planning presentations.

Secondly, as to the—we count apparently three applications. Remember, your honor, these applications were put in—these were submitted during the planning process.

In other words, frankly, they were an attempt to pre-empt the planning process by pushing forward Santa Fe's proposal for development of the property while the city was expending substantial time and effort to come up with a workable overall plan for the property.

The Court: Well, they did start, however, did they not, in 1971, with some kind of proposal for construction?

Mr. Weinberger: That resulted in a decade of litigation, yes, your honor.

The Court: Um-hum.

Mr. Weinberger: And I think the proposal in part was by a predecessor to Santa Fe.

But anyway, yes, Santa Fe did come in with a proposal at that time. The planning process was put on hold for over a decade as a result of this litigation. Plain and simply, it was ultimately resolved by the State Supreme Court.

But the point is, your honor, these applications that were tendered. Counsel here this morning tells the court that those applications were, quote, "rejected." He's used that word.

The point is, your honor, as the complaint, if it's read carefully, will indicate, in each case the city declined to accept the application as complete. They were never—

The Court: What is that—

Mr. Weinberger: The city felt that all the necessary documentation was not present in order to process the application.

I should tell the court, then, that they were returned to Santa Fe within the first 30-day period. They were never processed. They were never either approved or rejected. They were not reviewed.

The Court: Well, couldn't the city—you know, this admittedly has gone on with or without litigation since 1971.

Couldn't this city, or any city, essentially, by refusing or failing to process an application and declining to call it a rejection but call it something else, essentially forestall any finality that the courts require in order to have a case that's right for adjudication on these issues?

Mr. Weinberger: These applications that we're discussing, the three applications that were rejected came in right in the midst of a planning process that resulted following the dismissal of the litigation that we've referred to that started in the early 1970s.

So there has been a planning process, and the city is perfectly prepared at this point to live with the plan that is constructed through public input, some input, limited input from Santa Fe, through this entire planning process. As I say, it has a single year to respond to the application.

The fear that Santa Fe may submit an application that the city would wrongfully refuse to process—the city is subject to mandamus. If it should wrongfully refuse to accept an application—as a matter of fact, let me go slightly outside the papers before you to indicate that Santa Fe brought litigation against the city right in the midst of this planning process when the city did decline to accept one of Santa Fe's applications.

That suit was ultimately dismissed. It was never brought to judgment.

Mr. Mulcare: Well, there was a stipulated judgment, your honor.

Mr. Weinberger: Excuse me.

Mr. Mulcare: And stipulated in that judgment that Santa Fe had filed its applications it had exhausted its application process.

And it was further stipulated that the city did not even consider those applications on their merits.

The Court: Well, the point I wanted to get to is after all of these quote, "applications," regardless of the number, why isn't it

just as reasonable to treat Measure Q as essentially an adjudication of those applications rather than as yet another starting point?

Mr. Mulcare: Well, they are the response to the applications, your honor.

The complaint carefully alleges the process—ignoring the 1971 and the subsequent litigation, it ignores the process that started in the spring of 1982, which is alleged in the complaint.

At that time, Santa Fe renewed its efforts to develop its property. It submitted applications in response to the applications. This so-called planning process took place.

I will go on, if I may, your honor.

It seems that counsel's position, at least in its written briefs, is that as of the six appplications alleged in our complaint, they're alleged right there. Four of those were applications for development, and two of them were planning applications. That's what I get out of what their position is.

Further, I would like to continue. As far as the flexibility that counsel now seems to indicate the city council has, is in fact nonexistent. The city, in their briefs, indicate that all applications by Santa Fe must conform with and must implement and be consistent with the specific plan.

The specific plan in turn must contain—shall contain, shall conform, and shall implement Q, and Q, which is an ordinance, which cannot be changed by the city council, leaves absolutely no flexibility as to type or intensity.

To attempt at this point in time to go back and do something with Q is totally illusory.

As the specific plan indicates, any application for development, a master development plan, must be consistent with a specific plan. A specific plan must be consistent with Q.

Further, this very document, page 77, as I recall, states that any application for a variance must be consistent with the master development plan. The earlier portion says the master development plan must be consistent with Q.

The whole process is totally illusory. There is no relief in sight. And the city has taken no steps to grant any type of relief or in any way ameliorate this Q.

The Court: I'd like to hear a response from the city as to what I ask, namely: Why should measure Q be deemed essentially a final adjudication or action by the city on these various proposals or applications?

Mr. Weinberger: One reason to start from, your honor, is the recent circuit decision in the *Kinzli* case.

The Court—

The Court: But the difference here—and let me point out where the difference is and where I want you to direct your answer—is that the measure involved in *Kinzli* was not in response to any application by Kinzli.

And a very detailed and specific formulation, such as you have here, as to a specific piece of property and as to very detailed and explicit provisions as to what would be permitted, indeed, that's what this measure is. It appears to be a response to those applications with very little room for variance.

Mr. Weinberger: First of all, your honor, I think that *Kinzli* is instructive here, the circuit decision.

And the reason for that is that the circuit discusses meaningful applications, and the other cases that construe it make it clear that these are post-planning applications.

I think, your honor, the city would be put in a terrible position if it were told that its—at the outset that its planning process is going to substitute for its adjudicatory permitting process.

The whole process, if one looks at the specific plan, is set up in such a way as to complete a process—the planning process and head on to the detailed consideration of the specific proposal, in which the developers', the plaintiffs', the landowners' proposal can be tested specifically.

The city made a series—I have to tell the court—the city made a series of assumptions concerning economic viability and concerning environmental constraints that do need to be tested. But

to come straight to this court to tell them before an application is filed as the city always contemplated by state law and as a matter of fact is—the landowners require by state law to pursue a planning process once it's completed through the application process.

If it doesn't do so, this court will be right back in the position of speculating as to all of those factors that *Hamilton Bank, MacDonald* and *Kinzli* have instructed the courts not to entertain.

The Court: Okay. Counsel, I'm going to deem the matter submitted. It's now noon, and I will tell you tentatively what I'm going to do.

I think all of these cases I guess raise the issue of at what point does frustration reach futility?

It seems that the Supreme Court and certainly the Ninth Circuit has a higher level of frustration maybe than—quotient than some of us would tolerate.

I think that the main—essentially the instructions from the Ninth Circuit and the Supreme Court are that plaintiff is going to have to go back to the city yet one more time.

But I do think in this litigation and this type of litigation that if cities and counties are not more responsible in their bureaucratic process, that there is going to be a tremendous backlash.

This has gone on, as in many other cases that we have, for years and years and years, where litigants or property owners are caught in a bureaucratic morass that has no end and can never get into court.

And I trust that if the appropriate applications are made and they're not adjudicated or acted upon in good faith, as the city now claims it will do, that mandamus will have to be the resort.

But I think the Ninth Circuit and the Supreme Court have indicated that you're going to have to go back yet one more time and try to make some headway through that process and trust that in fact the city will, through the exception provided for in the statute, or in the ordinance, rather, exercise some degree of

discretion, if need be, in order to permit either use of the property, or finally, recognize that it constitutes taking, one or the other.

But I think one of the problems in all of these cases is that the municipalities have very often, through delay and so forth, avoided having to come to grips with those determinations.

Mr. Mulcare: Your honor, may I briefly—

The Court: That's it, counsel. You've had plenty of paper. In fact, you got in a lot extra, and I don't want that to ever happen again. Somebody did it, and I think it was—

Mr. Weinberger: It was us.

We were well admonished by your clerk, your honor.

The Court: Okay. You got in more than you were supposed to, and don't let it happen again.

Okay. Thank you.

Mr. Weinberger. Thank you.

Mr. Mulcare: Your honor, we do have a status conference.

The Court: You know what's going to happen with this then?

Mr. Mulcare: Yes, your honor.

The Court: It's going to be dismissed very likely, so you don't have to worry about that.

Okay.

Mr. Weinberger: Thank you, your honor.

(Proceedings adjourned at 12:05 p.m.)

United States District Court

Northern District of California

No. C-87-0804 MHP

Santa Fe Land Improvement Co.,
A California corporation,
Plaintiff,

v.

City of Berkeley,
a municipal corporation,
Defendant.

ORDER DISMISSING COMPLAINT

[Filed Aug. 25, 1987]

This action arises out of the City of Berkeley's restrictive zoning of plaintiff's property on the shoreline of San Francisco Bay. Frustrated by municipal regulation of commercial development on the Berkeley waterfront, plaintiff Santa Fe Land Improvement Co. ("Santa Fe") asserts claims for the unconstitutional denial of equal protection and due process, the taking of property without just compensation, and the violation of its civil rights under 42 U.S.C. § 1983. The matter is currently before the court on the city's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. The city contends that plaintiff has not yet obtained a final regulatory determination regarding the development of its property, and thus has failed to present the court with a justiciable controversy. For the reasons set forth below, the court agrees and dismisses the action.

I. FACTUAL BACKGROUND

As set forth in the complaint, the relevant facts are alleged as follows. Plaintiff Santa Fe owns approximately 125 acres of undeveloped real property adjacent to the shoreline of San Francisco Bay in the City of Berkeley. This property is comprised of areas referred to as the Brickyard, the Meadow, the North Basin Strip, and the South Shoreline. Plaintiff is the only private owner of real estate on the Berkeley waterfront. The adjacent property, owned by the city, has been leased for the construction of a hotel

and convention complex, office buildings, three restaurants, three sailing clubs, a boat repair yard and a 1,000 berth commercial marina.

In 1951, Berkeley zoned plaintiff's property as "unclassified." This classification authorizes all uses not otherwise prohibited by law, provided that a permit is secured for the desired use. The city's Master Plans adopted in 1964 and 1977 both designated the unclassified waterfront property as an area "to be studied," though no studies were subsequently conducted. Plaintiff alleges that the Master Plans, coupled with the zoning ordinance governing the use of plaintiff's property, failed to provide an adequate basis for evaluating any permit application submitted for the property's commercial development during this period.

In 1971 Santa Fe and its predecessors-in-interest proposed construction of a regional shopping center on the Meadow portion of the waterfront property. The city rejected the development proposal. Litigation ensued, which concluded in 1983. As part of the litigation's resolution, Berkeley and Santa Fe began negotiations over the future development of the plaintiff's property. This "cooperative planning process" between plaintiff and the city was supplanted in April 1983 by a "public planning process" involving a series of public workshops. The workshops continued through September 1983, when the city issued its "Phase 1 Waterfront Planning Process Report." The report recommended a negotiated development agreement between Santa Fe and the city.

On November 5, 1983, Santa Fe presented a conceptual plan for the development of its waterfront property at an economic conference sponsored by the city's mayor. Plaintiff alleges that the plan was consistent with the recommendations of the Phase 1 report. Upon learning that Berkeley nonetheless planned to extend the public planning process without further consideration of the plaintiff's conceptual plan, Santa Fe submitted a formal use permit application on December 8, 1983, in accordance with the city's zoning ordinance and the property's existing zoning classification. The application sought municipal approval for 3,000,000 square feet of commercial development. Plaintiff also filed a Master Plan Amendment Proposal to conform the city's existing Master Plan to its development proposal. On January 3, 1984, the

city rejected the permit application on the grounds that it lacked specificity.

On January 17, 1984, Berkeley initiated a Phase 2 Planning Process for the purpose of generating within 21 months a Master Plan Amendment and a Specific Plan for the development of plaintiff's waterfront property. Pursuant to this planning process, the plaintiff agreed to contribute $115,000 for the preparation of the required Environmental Impact Report ("EIR"). This contribution was made on the condition that the EIR analysis consider the full range of development alternatives, including substantially greater density and coverage than had been proposed by Santa Fe in its earlier development application. The city subsequently limited the maximum density and coverage of the EIR analysis to the terms of plaintiff's initial application.

Allegedly in response to this action, the plaintiff formally resubmitted its use permit application on March 20, 1985. The application was again rejected by the city on April 16. On May 1, plaintiff appealed the decision to Berkeley's City Council, and on May 15 submitted two specific development applications for a hotel and office building. The City Council scheduled a hearing on plaintiff's appeal for June 4, 1985, but instead adopted an interim Urgency Ordinance establishing a 45 day moratorium on the issuance of any development permits for the waterfront. The City Council subsequently extended the permit moratorium to December 31, 1985, and then again to July 31, 1986.

On July 25, 1985, the city directed its EIR consultant to recommend 500,000 square feet of total floor area development on plaintiff's 7,500,000 square feet of waterfront property. On September 12, 1985, the EIR consultant presented the city with the "Berkeley Waterfront Plan Preferred Alternative" calling for 705,000 square feet of development. On February 13, 1986, the city publicly adopted a "Revised Preferred Alternative" providing for 565,000 square feet of development and recommending that the central Meadow and Brickyard areas of plaintiff's property be acquired for public recreation and open space uses.

On October 7, 1986, Berkeley culminated its Phase 2 Planning Process with the adoption of the Berkeley Waterfront Plan

Amendment to the Master Plan ("Waterfront Plan") and the Berkeley Waterfront Specific Plan ("Specific Plan"), both of which incorporated the provisions of the Revised Preferred Alternative. The Waterfront Plan states the the "Specific Plan constitutes the City's zoning for the Waterfront . . . ." The Specific Plan enumerates in great detail the density, location, coverage, and specifications of development permissible on plaintiff's property, and establishes a permit application process for such development.

The terms of the Waterfront Plan and the Specific Plan were endorsed by "Berkeley Measure Q," an initiative zoning ordinance passed by the city's voters on November 4, 1986. Measure Q stipulates that its specific terms shall not be amended or repealed except by vote of the people. Measure Q further provides that it shall not be construed to authorize a taking of private property for public use, or to implicate the constitutional rights of any property owner. Upon the adoption of Measure Q, plaintiff Santa Fe filed this action.

II. DISCUSSION

Defendant's motion to dismiss the complaint on finality grounds presents the court with a single question of law: has the plaintiff obtained from the city a final regulatory determination of the type and intensity of development permissible on its waterfront property? If the plaintiff has not yet obtained such a determination, its claims are not ripe for adjudication and the complaint must be dismissed for lack of subject-matter jurisdiction.[1]

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[1] The finality requirement applies equally to claims for uncompensated takings as well as to related claims for the denial of equal protection, due process, and the deprivation of civil rights under 42 U.S.C. § 1983. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56 (9th Cir. 1987); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145-46 (9th Cir. 1986). Plaintiff's entire complaint is thus subject to the jurisdictional prerequisite of a final regulatory determination.

A. Standard for Finality

In a series of recent opinions, the Supreme Court has clarified the finality requirement and suggested the showing necessary to satisfy it. As the Court has made increasingly clear, challenges to land-use regulations are not ripe for adjudication "until the govenment entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 3121 (1985). This requires that the government provide a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, ____ U.S. ____, 106 S. Ct. 2561, 25566 (1986). While the precise contours of a "final and authoritative determination" remain to be defined, recent Supreme Court decisions indicate that prior to bringing suit, finality minimally requires that a plaintiff submit at least one development application to the appropriate regulatory authority, and upon its rejection seek variances permitting uses not authorized under the governing zoning ordinance. *Williamson*, 105 S. Ct. at 3117-18; *MacDonald*, 106 S. Ct. at 2567; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Court has also made clear that if the rejected development plan is "exceedingly grandiose," finality requires that the plaintiff subsequently submit a less ambitious development application prior to bringing suit. 106 S. Ct. at 2569 n.9. Nonetheless, a plaintiff "is not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *Id.* at 2567 n.7.

B. The Finality of the City's Determination of Permissible Development on Plaintiff's Property

The city argues that plaintiff has failed to satisfy the finality requirement delineated by recent Supreme Court authority insofar as Santa Fe has not submitted a development application pursuant to the procedures set forth in the Specific Plan, nor sought any variance from or modification of an adverse decision rendered under those provisions. *See* Berkeley Waterfront Specific Plan § 7.3 *et seq.* In response, plaintiff offers four arguments in support of the finality of its claims. These include (1) that

finality is appropriately determined by an ad hoc, factual inquiry, and thus that the court presumably need not focus on formalities such as the submission of prior development applications; (2) that Santa Fe has in fact submitted prior development applications satisfying the finality requirement; (3) that the submission of a development application pursuant to the permit procedures of the city's 1986 enactments is not required for finality purposes, since the enactments represent a final adjudicative determination of plaintiff's prior development applications rather than new zoning ordinances; and (4) that the plaintiff's failure to submit a development application pursuant to procedures of the 1986 enactments is excused by the futility exception to the finality requirement.

1. *Ad Hoc Determination of Finality.* Plaintiff first attempts to sidestep the entire line of precedent setting forth the finality requirement by arguing that "the question of whether the type and intensity of development has been determined is a practical one, the answer to which must be based upon the particular facts of the case before the Court." Plaintiff's Opposition Memorandum, at 16. In support of this assertion, plaintiff misleadingly cites language in the *MacDonald* opinion for the proposition that the court's analysis of finality must follow an "ad hoc, factual inquir[y]." 106 S. Ct. at 2566. The inquiry discussed by the Court in *MacDonald,* though, plainly pertains to the determination of whether a regulatory taking has occurred, not the other threshold jurisdictional question of whether the regulatory decision itself is final. The latter issue is the only one before this court, and it is resolved not by a case-specific factual inquiry but by the application of objective criteria identified by Supreme Court precedent.

2. *Submission of Prior Applications.* Among the objective criteria for a "final and authoritative determination" is the prior submission of at least one development application and one variance request to the appropriate municipal authority. Plaintiff argues that it has satisfied this prerequisite by submitting multiple development applications to the city, including its 1983 use permit application and Master Plan Amendment proposal, its 1983 conceptual plan, its 1985 resubmission of the earlier use permit application, and its 1985 specific development applications

for the construction of a hotel and an office building. Each of these rejected applications, though, preceded the 1986 enactments which revised the zoning provisions governing development on the Berkeley waterfront. While the Specific Plan delineates an extensive permit application process at section 7.3, plaintiff has chosen not to avail itself of the enactment's new permit procedures.

The required submission of at least one meaningful development application prior to bringing suit presumes that the preceding application is made pursuant to the current zoning ordinances and procedures; otherwise, there can be nothing final about the challenged regulatory act, since it represents the product of a regime no longer governing the decisions of the planning authority. This was recently made quite clear in a case involving strikingly similar factual circumstances:

> The City argues that plaintiffs have . . . not submitted a development plan under the present land use regulations . . . ; they have not applied for a variance; they have not applied for a zoning change. Plaintiffs counter that they have already received several final rejections of their efforts at Queen's Beach, that they should not be required to beat their heads against a stone wall, and that all further efforts would be futile. The record shows that plaintiffs have been involved in an ongoing attempt to develop Queen's Beach as a resort. The majority of their activity, however, has been attempts to influence the drafting of the East Honolulu Development Plan and amendments thereto. Plaintiffs have made only two specific applications for zone change or development. . . . Plaintiffs have made no attempt to apply for development permits, zoning changes, or variances at Queen's Beach under its present zoning. . . . Plaintiffs have made no meaningful application to determine what uses or combinations of uses might be approved at Queen's Beach. As [Supreme Court precedent] make[s] clear, there is, as yet, simply no "concrete controversy regarding the application of the specific zoning provisions."

(citation omitted) *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 940-42 (D. Haw. 1986). Santa Fe's

rejected development applications made pursuant to the previous zoning ordinance therefore cannot be used for purposes of the finality requirement to excuse the absence of any development application or variance request under the new zoning provisions of the Specific Plan.[2]

3. *1986 Enactments as Final Determinations.* Plaintiff alternatively argues that Measure Q, the Waterfront Plan, and the Specific Plan are not actually zoning enactments, but rather the city's final adjudication of Santa Fe's earlier development applications, disguised as revised zoning laws. Plaintiff thus contends that finality does not require the submission of a development application under the 1986 enactments, since they represent only the conclusion of an ongoing application process rather than a new regulatory regime. In support of this contention, plaintiff cites the specificity with which the 1986 enactments identify the type and intensity of development allowed on Santa Fe's property; the absence of discretion with respect to the implementation of these specified provisions; the fact that the enactments apply only to the plaintiff, as the sole private property owner on the Berkeley waterfront; and the absence of available legislative or administrative relief, since only a vote of the people can amend the provisions endorsed by Measure Q.

Plaintiff's argument significantly misconstrues the express terms of the 1986 enactments. While the enactments do specify allowable development on plaintiff's property with great precision,

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[2] Plaintiff cannot be required to pursue unfair procedures to obtain a final regulatory determination. *MacDonald*, 106 S. Ct. at 2567 n.7. Thus were the city to manipulate the zoning process by enacting a new ordinance each time the plaintiff submitted a new development application, or indefinitely imposed a moratorium on use permit applications, the finality requirement could not be used to shield the city from litigation. Here, though, the city altered the zoning status of plaintiff's property for the first time since 1951, and did so after a three year deliberative process in which the plaintiff and the public played a significant part. It is premature to characterize this as an unfair tactical ploy to avert litigation. Nonetheless, future revisions of the zoning ordinance must be examined with greater scrutiny if the effect will be to deny plaintiff a final, appealable zoning determination.

Measure Q explicitly states that it shall not be construed to effect a taking of private property for public use nor to implicate the constitutional rights of any property owner. To the extent that this provision conflicts with the specified development parameters set forth elsewhere in Measure Q and the Specific Plan, discretion is clearly vested with the planning authority to resolve any inconsistency. Furthermore, section 7.3.11 of the Specific Plan provides for an appeal procedure to the City Council from initial determinations of the Planning Commission, providing yet another level of discretionary review. Thus under the terms of Measure Q, plaintiff could significantly alter the type and intensity of allowable development on its property were it capable of demonstrating to either the Planning Commission or the City Council during the application process that development as specified in the 1986 enactments interfered with its reasonable investment-backed expectations. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). This does not suggest that a final determination has already been made.

More significantly, plaintiff's argument regarding the determinative character of the 1986 enactments requires the court to engage in speculation about the impact of the zoning provisions which is flatly prohibited by the ripeness doctrine itself. Plaintiff asks the court to look past the express terms of the enactments and divine their true intent and impact, absent any action by the planning authority charged with implementing the terms of the zoning regulations. As the Ninth Circuit recently observed, though, there is simply no circumstance where the court can substitute its speculative judgment for the determination of a planning authority presented with an actual development application. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987). Regardless of the specificity of the 1986 enactments and the absence of discretion in their implementation, case authority requires that the city's planning authority nonetheless complete its possibly foreordained task and adjudicate an actual development application before a justiciable controversy exists. As this court recently wrote with respect to another administrative function of the defendant, "[w]hile . . . plaintiffs should not be overly optimistic about the ultimate sufficiency of the City's administrative remedy, they must nonetheless allow Berkeley the opportu-

nity to act upon its word." *Ross v. City of Berkeley*, 655 F. Supp. 820, 841-42 n.21 (N.D. Cal. 1987).

4. *The Futility Exception.* Plaintiff's final argument invokes the futility exception to the finality requirement. Santa Fe asserts that the specificity and lack of discretion characterizing the 1986 enactments demonstrate that any application for a property use not explicitly endorsed by the new zoning provisions would be an "idle and futile act," thus establishing the existence of a ripe controversy despite the absence of a development application. *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9thCir.), *cert. denied*, 464 U.S. 847 (1983); *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981). Plaintiff urges the court to acknowledge the improbability of the municipal planning authority varying from the enactments' specific terms, and accordingly requests that its failure to sumbit a development application pursuant to the procedures of the 1986 enactments be excused on futility grounds.

Plaintiff's argument ignores the most recent pronouncement of the Ninth Circuit on the futility exception. In *Kinzli v. City of Santa Cruz*, the circuit held unequivocally that the futility exception can be applied only to acts or omissions occurring subsequent to the submission of a development application and a variance request. 818 F.2d at 1455 n.6. Thus as a threshold consideration, "at least one 'meaningful application' must be made" for both a use permit and a variance before a plaintiff can invoke the exception. (citation omitted) *Id.* In light of the preceding analysis, it is clear that Santa Fe's failure to submit a development application after the enactment of Measure Q, the Waterfront Plan, and the Specific Plan bar plaintiff from relying on the futility exception.[3] Nonetheless, the court must remind the city that it cannot use the application process to endlessly thwart litigation; plaintiff has in good faith sought a final regulatory determination for a number of years, and Berkeley must now be

[3] Given this disposition, the court does not reach defendant's argument that the complaint alternatively should be dismissed because of the existence of an adequate state procedure for the remedy of plaintiff's alleged injuries.

prepared to promptly provide it upon receipt of plaintiff's use permit and variance applications under the 1986 enactments. The city's failure to do so most assuredly will not suffice to preclude judicial review.

ACCORDINGLY, plaintiff's claims for the denial of equal protection and due process, the taking of property without just compensation, and the violation of civil rights under 42 U.S.C. § 1983, are not ripe for adjudication, and are dismissed for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

DATE: Aug. 26, 1987

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

United States District Court

Northern District of California

No. C-87-0804 MHP

Santa Fe Land Improvement Co.,
a California corporation,
Plaintiff,

v.

City of Berkeley,
a municipal corporation,
Defendant.

Judgment

[Filed Aug. 26, 1987]

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been presented and an order having been duly filed herein,

IT IS ORDERED and ADJUDGED that this action be and is hereby dismissed.

DATED: Aug. 26, 1987

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

Not for Publication
United States Court of Appeals
For the Ninth Circuit

No. 87-2717
D.C. No. CV 87-0804-MHP

Santa Fe Land Improvement Company,
a California corporation,
Plaintiff-Appellant,

v.

City of Berkeley, a municipal corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and submitted June 16, 1988
San Francisco, California

MEMORANDUM*

[Filed Aug. 29, 1988]

Before: GOODWIN, Chief Judge, CHOY and NORRIS, Circuit Judges.

Santa Fe Land Improvement Company appeals the dismissal of its regulatory taking claim brought pursuant to 42 U.S.C. § 1983 (1982). The district court determined that Santa Fe's claim was not ripe for judicial adjudication and dismissed for lack of subject matter jurisdiction. We affirm.

Santa Fe owns approximately 125 acres of undeveloped real property adjacent to the shoreline of San Francisco Bay in the City of Berkeley. Santa Fe is the only private owner of real estate on the Berkeley waterfront. The adjacent property, owned by the city, has been leased for a hotel and convention complex, office

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

buildings, three restaurants, three sailing clubs, a boat repair yard and a 1,000-berth commercial marina.

Since 1971, Berkeley has rejected all development proposals put forward by Santa Fe. Santa Fe formally resubmitted an amended use permit application in 1985. The application was promptly rejected. Santa Fe appealed the decision to the City Council. The City Council scheduled a hearing on Santa Fe's appeal for June 4, 1985, but instead adopted an interim Urgency Ordinance establishing a 45-day moratorium on the issuance of any development permits for the waterfront. The City Council subsequently extended the permit moratorium to December 31, 1985, and then again to July 31, 1986.

On July 25, 1985, Berkeley directed its EIR consultant to recommend 500,000 square feet of total floor area development on plaintiff's 7,500,000 square feet of waterfront property. On September 13, 1985, the EIR consultant presented Berkeley with the "Berkeley Waterfront Plan Preferred Alternative" calling for 705,000 square feet of development. On February 12, 1986, Berkeley publicly adopted a "Revised Preferred Alternative" poroviding for 565,000 square feet of development and recommending that the central Meadow and Brickyard areas of Santa Fe's property be acquired for public recreation and open space uses.

On October 7, 1986, Berkeley culminated its Phase 2 Planning Process with the adoption of the Berkeley Waterfront Plan Amendment to the Master Plan (Waterfront Plan) and the Berkeley Waterfront Specific Plan (Specific Plan), both of which incorporated the provisions of the Revised Preferred Alternative. The Waterfront Plan states that the "Specific Plan constitutes the City's zoning for the Waterfront. . . ." The Specific Plan enumerates in great detail the density, location, coverage, and specifications of development permissible on Santa Fe's property, and establishes a permit application process for such development.

The terms of the Waterfront Plan and the Specific Plan were endorsed by "Berkeley Measure Q," an initiative zoning ordinance passed by the city's voters on November 4, 1986. Measure Q stipulates that its specific terms shall not be amended or

repealed except by vote of the people. Measure Q further provides that it shall not be construed to authorize a taking of private property for public use, or to implicate the constitutional rights of any property owner.

Santa Fe contends that Measure Q constitutes the final and immutable determination of the type and intensity of development legally permitted on its waterfront property and that, given the final and immutable nature of Measure Q, no recognized principle of ripeness bars Santa Fe from going forward with litigation. Santa Fe's claim that Measure Q effected a taking as applied to its property does not, however, present a concrete controversy ripe for adjudication. Santa Fe must first submit a development plan or apply for a land use permit. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 775 (1988).

Santa Fe, to initiate its regulatory taking claim, must first establish (1) that after Measure Q was adopted, a specific development plan was rejected, (2) that the rejection constituted a taking of its property, and (3) that any compensation tendered is unjust. *MacDonald*, 477 U.S. at 348; *Kinzli*, 818 F.2d at 1453.

In establishing the first element of its regulatory taking claim, Santa Fe must demonstrate that "a final and authoritative determination of the type and intensity of development legally permitted on the subject property [has been rendered]." *MacDonald*, 477 U.S. at 348. Without satisfaction of this prerequisite, it would be impossible to begin assessing whether Measure Q goes too far:

> [T]he difficult problem [is] how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . [R]esolution of that question depends, in significant part, upon an analysis of the effect . . . of the . . . regulation[] had on the value of [the] property and investment-backed profit expectation. That effect cannot be measured until a final

> decision is made as to how the regulation[ ] will be applied to [the] property.

Williamson, 473 U.S. at 199-200 (footnote omitted). Similarly, we cannot determine whether Berkeley has failed to provide just compensation until we know what, if any, compensation the responsible city administrative body intends to provide. *See id.* at 195.

To surmount the final decision bar, Santa Fe's taking claim must reflect an already rejected development plan and a denial of a variance. *See Herrington v. County of Sonoma*, 834 F.2d 1488, 1494 (9th Cir. 1987); *Kinzli*, 818 F.2d at 1454. At the heart of this requirement is a showing of "concrete harm" upon Santa Fe as a landowner.

Santa Fe says it has not attempted to secure either a rejected plan or a variance denial following the enactment of Measure Q because to do so would be futile. Futility may be true, as a practical matter, but Santa Fe must go through the formal procedure before the action will lie. The final decision bar applies.

The Supreme Court in *MacDonald* has indicated that at least one meaningful application[1] must be submitted before the futility exception applies.[2] 477 U.S. at 352-53 n.8; *American Savings & Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) (submission of a development application would not be futile where landowner had failed to submit a meaningful application). Because Santa Fe has failed to submit a meaningful application under the new ordinance, the futility exception does

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[1] Meaningful as used here "does not include a request for 'exceedingly grandiose development.' " *Kinzli*, 818 F.2d at 1455 (quoting *MacDonald*, 477 U.S. at 353 n.9).

[2] We have also recognized in this circuit that landowners, in addition to the meaningful application requirement, bear a heavy onus in showing futility. *See Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 876 (9th Cir. 1987); *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

not apply to circumvent the final decision bar to its taking claim.[3] *See Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d at 872-77 (9th Cir. 1987), *petition for cert. filed*, June 22, 1988; *Kinzli*, 818 F.2d at 1455 n.6. Consequently, we need not address the remaining questions that can be presented after ripeness is satisfied. The district court correctly determined that Santa Fe's regulatory taking claim was not ripe for consideration.

AFFIRMED.

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[3] In reaching this conclusion, we rely on Berkeley's claim, both in its briefs and at oral argument, that section 5 gives city planners discretion to apply Measure Q's terms flexibly.

Not For Publication

United States Court of Appeals
For the Ninth Circuit

No. 87-2717
D.C. No. CV 87-0804-MHP

Santa Fe Land Improvement Company, a California corporation,
Plaintiff-Appellant,

v.

City of Berkeley, a municipal corporation,
Defendant-Appellee.

ORDER
[Filed Nov. 4, 1988]

Before: GOODWIN, Chief Judge

Appellees shall file a response to Appellant's Petition for Rehearing within twenty-one (21) days.

United States Court of Appeals
For the Ninth Circuit

No. 87-2717
D.C. No. CV 87-0804-MHP

Santa Fe Land Imporovement Company, a California corporation,
Plaintiff-Appellant,

v.

City of Berkeley, a municipal corporation,
Defendant-Appellant.

ORDER
[Filed Jan. 3, 1989]

Before: GOODWIN, Chief Judge, CHOY and NORRIS, Circuit Judges.

Appellants' petition for rehearing is denied.

County of Alameda

Sample Ballot
& Voter Information Pamphlet
General Election
Tuesday, November 4, 1986
THE LOCATION OF YOUR
POLLING PLACE
IS SHOWN ON BACK COVER

Polls Open at 7 A.M. and Close at 8 P.M.

NOTICE: Absent Voter Ballot Application Enclosed

Muestra de Balota
y Panfleto de Información para el Elector
Elección General
Martes, 4 de Noviembre de 1986
EL LUGAR DONDE DEBE
USTED VOTAR
APARECE EN LA CUBIERTA POSTERIOR

Las Elecciones Empiezan a las 7 A.M. y terminan a las 8 P.M.

AVISO: Applicacion de Balota Ausente Incluido

City of Berkeley Initiative Ordinance

P MEASURE P: Shall an ordinance be adopted limiting development on the waterfront to the area known as the north basin strip (North of Virginia St.) and designating as open space the beach, brickyard and meadow; and shall the City's Master Plan, Zoning Ordinance and Waterfront Specific Plan be amended to conform?

Financial Implication: Administrative costs; amount unknown. Yes ☐ No ☐

Full Text of Measure P

BE IT ORDAINED by the people of the City of Berkeley as follows:

Section 1. Purposes.

(a) To protect and promote the public health, safety, and welfare by designating certain areas of the Berkeley waterfront; the Berkeley Beach, the Brickyard, and the Meadow for preservation as open space.

(b) To require that the Master Plan and Zoning Ordinance of the City of Berkeley, and the Berkeley Waterfront Specific Plan be revised within six (6) months of the effective date of this ordinance.

Section 2. Findings.

It is hereby found and determined as follows:

(a) It is in the best interests of the residents of the City of Berkeley to preserve and protect the open space, views, wetlands, wetland-type environment, bay front meadows, marshes, wild life habitats, beaches, creek mouths, and the unique and irreplaceable waterfront area of the City, being all that land in the City of Berkeley generally adjacent to San Francisco Bay and west of U.S. Interstate 80 (I-80).

(b) The portion of the waterfront area west of I-80, south of Virginia Street (including the City's Virginia Street easement), and east of the Berkeley Marina constitutes environmentally sensitive, irreplaceable, and unique contiguous waterfront open space, wetlands, marshes, wetland type environment, plant and wildlife habitat, and bay front meadow; and it is in the public interest to preserve, protect, and restore all said portion of the waterfront area in a natural, open and undeveloped form.

(c) Unless those areas of the Berkeley waterfront south of Virginia Street and east of the Berkeley Marina are preserved as open space the following adverse effects are likely to occur:

(1) Traffic. Traffic congestion in and around the waterfront, already unacceptable, will increase.

(2) Wetlands and habitats. Important wetlands and habitats will be lost, resulting in the loss of waterfront plant life and wildlife, including migratory birds, and a further diminishing of the health of San Francisco Bay. The wetlands resolutions adopted by the Berkeley City Council on February 13, 1986 are hereby incorporated into this ordinance by reference.

(3) Open Space. The City of Berkeley would lose a unique contiguous open space area. Irreplaceable scenic beauty would also be lost.

(4) Pollution. There would be an increase in air, noise, and water pollution.

(5) Seismic safety. Because of the geology of the land and its proximity to major earthquake faults, development would result in a threat to life and property in the event of an earthquake.

(d) Title 7, Article 10.5 of the California Government Code, "Open Space Lands," hereby incorporated into this ordinance by reference, mandates that cities make and carry out plans "for the preservation of valuable open-space land."

Section 3. Policies.

(a) Those areas of the Berkeley waterfront west of I-80, south of Virginia Street and the North Basin (including the City's Virginia Street easement), and east of the Berkeley Marina (commonly known as the Berkeley Beach, the Brickyard, and the Meadow, including the East Meadow) shall remain in open space in perpetuity. Except as specified in this ordinance, no development shall be permitted in these areas. The Berkeley Beach is the seven (7) or more acres of shoreline west of I-80 and extending from the Emeryville city limits to the Brickyard. The Brickyard is the approximately 29 acres of land west of I-80, and south of University Avenue. The Meadow is the approximately 72 acres of land west of I-80, north of University Avenue (and including the strip of land immediately south of University Avenue), south of Virginia Street and the North Basin (and including the City's Virginia Street easement), and east of the Berkeley Marina. A nature interpretive center no more than one (1) story, not to

exceed a height of 20 feet and containing no more than 5,000 gross square feet of floor space shall be permitted on the Brickyard subject to a use permit. An appropriate number of public restroom facilities shall be permitted on the Meadow, Brickyard, and Berkeley Beach.

(b) Development shall be permitted on those areas of the waterfront not covered by Section 3.(a) of this ordinance, subject to policies contained in the Berkeley Master Plan, Berkeley Zoning Ordinance, Berkeley Waterfront Specific Plan, and any other relevant policies that may be adopted by the Berkeley City Council and any policies that may be adopted by the citizens of Berkeley in an initiative ordinance.

Section 4. Programs and Time Limits.

Within six (6) months of the effective date of this ordinance, the City of Berkeley's Master Plan, Zoning Ordinance and Waterfront Specific Plan shall be amended to incorporate the policies contained in this ordinance. However, the policies contained in this ordinance shall be in force as soon as the ordinance takes effect.

Section 5. Constitutionality.

This ordinance is not intended, and shall not be construed as authorizing the City of Berkeley to exercise its power in a manner which will take or damage private property for public use. This ordinance is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Section 6. Severability.

If any portion of this ordinance is hereafter determined to be invalid, all remaining portions of this ordinance shall remain in full force and effect, and to this extent the provisions of this ordinance are separable.

Section 7. Amendment.

No part of this ordinance shall be amended or repealed, except by a vote of the people.

Section 8. Effective date.

This ordinance shall take effect immediately upon its passage by the voters of the City of Berkeley.

Berkeley City Attorney Analysis of Measure P

The proposed ordinance, if adopted, would regulate development on certain areas of the Berkeley waterfront currently owned by Santa Fe Land Improvement Company in the following manner.

1. Prohibit any development, other than public restrooms and a nature interpretative center of no more than one 20 foot story, containing no more than 5000 square feet, on certain areas of the Berkeley Waterfront, currently owned by Santa Fe Land Imporovement Company, located west of I-80, south of Virginia Street and the North Basin (including the City's Virginia Street Easement) and east of the Berkeley Marina. The areas in which such development is prohibited are commonly known as the Meadow (72 acres of land west of I-80 and north of University Avenue, including a strip south of University Avenue), the Brickyard (approximately 29 acres of land west of I-80 and south of University Avenue) and the Berkeley Beach (7 acres of shoreline west of I-80 extending from Emeryville to the Brickyard).

2. Require that the Meadow, Brickyard and Berkeley Beach remain in open space in perpetuity, but authorize development on the remaining Santa Fe land at the waterfront located in the North Basin, north of Virginia Street.

3. Require, within six months of passage of the ordinance, that the City's Master Plan, Zoning Ordinance and Waterfront Specific Plan be amended to incorporate the policies contained in the ordinance. Under the City Plan in effect on August 1, 1986, the waterfront is designated as "unclassified" and, thus, any development may be approved upon a finding of no detriment by the Board of Adjustments or the City Council on an appeal. As of August, 1986, the date this analysis was prepared, the City is completing a three year planning process in which it has tenta-

tively approved a plan for the waterfront and is in the process of receiving public comments on the Environmental Impact Report which the City commissioned regarding the proposed plan. This ordinance differs from the current proposed plan in three respects: Firstly, the current proposed plan calls for public acquisition of the Brickyard, the Berkeley Beach and 50 acres of the Meadow, whereas this ordinance requires that these areas, including the entire 72 acre Meadow remain as open space in perpetuity, irrespective of whether the City actually buys the land from Santa Fe. Secondly, the current proposed plan would permit development of a hotel and conference center in the East Meadow, if Santa Fe's lease with the racetrack at Golden Gate Fields precludes development in the North Basin until 1997, whereas this ordinance would prohibit all development in the East Meadow whether or not Santa Fe's lease precludes it from development in the North Basin. Thirdly, the current proposed plan calls for public acquisition of the East Meadow if the lease does not preclude development in the North Basin, whereas this ordinance requires that the East Meadow remain open space in perpetuity, irrespective of whether the City does not actually buy the land. Public acquisition of any of the land required to remain open space would be permissible.

This ordinance differs from the other measure regarding the waterfront in two major respects:

(a) This measure prohibits construction of any structure in any portion of the meadow, whereas the other measure would permit development on no more than twelve acres of the 72 acre Meadow if development in the North Basin strip is legally and financially infeasible because of a lease existing as of January 1, 1986, between Santa Fe and Pacific Racing Association.

(b) This initiative ordinance specifies that development on the North Basin Strip shall be based on the City's planning process which as of August 8, 1986, fixes development at 565,000 sq. ft. However it does not attempt to bar the City Council from making changes in the development to be allowed on the North Basin Strip at a later date.

If both measures pass, the one which receives the most votes will supersede any conflicting provision of the other.

Financial Implications

Additional administrative costs to revise the City's plans and zoning ordinance in an amount unknown at this time.

Argument in Favor of Measure P

Measure 'P', the citizens' initiative, will save our waterfront from massive development. Because Berkeley residents are so concerned about the preservation of their magnificent open space bayfront, in just eight days over 3,600 of them signed a petition to put Measure 'P' on the ballot.

Measure 'P' protects the waterfront "Meadow" (the open field between the Marina and Interstate 80), the Brickyard (the peninsula just south of University Avenue), and the Berkeley Beach. These are the most ecologically sensitive areas of our waterfront. The Environmental Impact Report on the waterfront indentifies 17 acres of seasonal ponds on the Meadow as a migratory bird habitat. Numerous species of waterbirds, including the endangered brown pelican and the California least tern, frequent the site.

The greatest concentration of these ponds is on the Meadow's east end, exactly where the pro-development Measure 'Q' on this ballot would build a huge hotel twice the size of the Golden Bear complex at University and Milvia. These ponds would be destroyed and a critical migratory bird habitat would be lost forever. This hotel would also have disastrous traffic and pollution impacts throughout the waterfront and in West Berkeley. The hotel would also make the remaining open space less accessible to local residents. And it would threaten Bay water quality.

Measure 'P' respects the property owner's rights by allowing some development north of Virginia Street. However, any development would have to be compatible with the environment.

Every year the Bay Area becomes more densely developed and open space harder to find. It is therefore crucial that we preserve as much of our waterfront as possible so that we and future

generations will be able to enjoy the bayfront's unparalleled views and its calming and restorative qualities.

Save our irreplaceable waterfront. Vote YES on 'P'. Vote NO on 'Q'.

s/City Councilmember John Denton, Chair Council Waterfront Committee

s/Albert Lepawsky, President Berkeley Bayfront Conservancy Fund

s/Gerda Miller, Convenor Berkeley Gray Panthers

s/Irv Rautenberg, Director Bayfront Conservancy Fund

s/Erna P. Harris

Rebuttal to Argument in Favor of Measure P

"Measure P won't protect the waterfront from massive development—not the Meadow, not Berkeley Beach, not the Brickyard, not the seasonal ponds, not the migratory birds—if it's thrown out of court."

—Norman La Force, Director, Berkeley Bayfront Conservancy Fund

The authors of Measure P are our friends. We share the same goals and vision for the waterfront. But experienced environmental attorneys have repeatedly issued the same warning: the legally sloppy approach of Measure P may not stand up in court.

Measure P makes two other major mistakes:

• If fails to place height and square-footage limits on buildings located north of the Meadow. Possible result: massive highrises along I-80.

• It fails to restrict development on the East Meadow to the minimum, should the city be legally required to allow it. Possible result: massive development on the Meadow.

It's for these reasons that the Sierra Club waterfront taskforce drafted Measure Q. It plugs gaps. It corrects errors. It provides backup protections. It gives Berkeley's lawyers the strongest

possible legal basis for defending its environmentally sound waterfront plan against Santa Fe.

In the best of all possible worlds, Santa Fe would join with the city in protecting the environment, and Measure P would be adequate. In the real world, where Santa Fe wants only to maximize its profits, the waterfront needs strong, legally tight protection.

Measure P doesn't do the job. Measure Q, written by the Sierra Club waterfront taskforce, does.

PLEASE VOTE NO ON P AND YES ON Q.

s/Maudelle Shirek, City Councilmember

s/Helen King Burke, Director, EBMUD

s/Luis Reyna, Vice-Chair, Waterfront Commission

s/Curt Manning, West Berkeley Project Area Committee

s/Steve Bedrick, Land Use and Environmental Attorney

Argument Against Measure P

Danger: Low Protection

Though well-intentioned, this initiative is dangerous to the City. It does not offer the City sufficient legal protection in a lawsuit by the landowner, Santa Fe. This greedy company, the biggest private landowner in the State of California, has continually tried to bully the City with lawsuits. We must be prepared for more. We cannot afford to weaken the City's legal defense by voting for this initiative.

Danger: No Planning

What's wrong with it? The initiative does not draw upon the reports and studies produced during the three year planning process that supports the City's case for low-density development and environmental protection.

Danger: High Density

This initiative does not restrict development on the North Basin Strip, the stretch of land along I-80 where tall buildings could block our beautiful bay views. Citizens have worked for three years to insure height and density limits on the Waterfront. This measure removes those protections.

Save the Waterfront

Fortunately, you have a better choice—the Waterfront Conservation and Planning Act sponsored by the Sierra Club. This alternative measure is designed to stop Santa Fe's legal abuses and to protect our Bayfront environment with its irreplaceable shoreline open space.

Protect the Waterfront

Vote No on Measure Q and Yes on Measure P

s/Jim Liljenwall, Chair, Waterfront Commission
s/Curt Manning, West Berkeley Project Area Committee
s/Ramsey Miller, Planning Commission
s/David Taylor, Chair, Board of Adjustments

Rebuttal to Argument Against Measure P

Measure P, the Citizens' Initiative, is the only ballot measure that preserves the entire Berkeley waterfront Meadow as open space. The Meadow is the most ecologically fragile area of the waterfront. The counter waterfront measure on the ballot, Measure Q, allows a massive hotel and convention center to be built on the Meadow, destroying wetlands and a migratory bird habitat.

Measure P is legally sound. The allegations made by the opponents of Measure P are unsubstantiated. Measure P protects waterfront open space while respecting the landowner's rights.

Measure P respects the planning process. It fulfills the community's desire to preserve the Meadow, Brickyard, and Beach and allows the community to determine how much development will be allowed on the waterfront's North Basin Strip. Measure Q,

however, abuses the planning process by permitting 565,000 square feet of development (equal in size to the Transamerica Pyramid) to be built on the Meadow and North Basin Strip, even though this is far more development than the community wants. The waterfront Environmental Impact Report says that this level of development would have disastrous environmental and traffic impacts.

Save Our Bayfront

As the San Francisco Bay Area continues to grow outward in every direction, open space becomes ever more difficult to find. To protect our physical and spiritual well-being in an overdeveloped Bay Area megalopolis, we must preserve our open space bayfront. Measure P will protect our unique and irreplaceable waterfront for present and future generations. Join leading environmentalists in voting YES on P.

s/Councilmember John Denton, Attorney, Chair Council Waterfront Committee.

s/David Brower, Board Member National Sierra Club, Berkeley Native.

s/Albert Lepawsky, President Berkeley Bayfront Conservancy Fund.

s/Dona Spring, Convenor East Bay Defenders of the Environment.

s/Alan Goldfarb, Member Berkeley Planning Commission.

City of Berkeley Proposed Ordinance

Measure Q: Shall an ordinance be adopted which requires zoning to limit development on the entire waterfront and which protects its ecology and open-space in accordance with the Community Planning Process of 1984-86?

Financial Implication: Administrative costs; amount unknown. ☐ YES ☐ NO

Full Text of Measure Q

BE IT ORDAINED by the People of the City of Berkeley as follows:

That the following policies be incorporated into the Master Plan, the Waterfront Specific Plan, and the Zoning Ordinance.

Section 1: Findings

The People of the City of Berkeley find that it is in the public interest to preserve and protect the open space, views, wetlands, tidal mudflats, seasonal ponds, wetlands-type environment, creeks, meadows, beaches and the low density character of the unique and irreplaceable waterfront area of the City, being all that land in the City of Berkeley generally adjacent to San Francisco Bay and lying west of Interstate Highway 80 and east of Marina Boulevard.

The People of Berkeley further find, based on numerous scientific studies and data, including those developed during the Waterfront Planning Process of 1984-86, and in the draft Environmental Impact Report of June 1986, that the portion of the waterfront area south of the northern edge of Virginia Street (as extended westward), and including School House Creek, constitutes environmentally sensitive, irreplaceable, and unique wetlands, marshes, seasonal ponds, meadows, wildlife habitat, and other features of the natural ecology; and that it is in the public interest to preserve, protect, reclaim, and/or restore all said portion of the waterfront in a natural, open, and undeveloped form.

These actions are necessary to protect the public health, safety, and welfare and to avoid unnecessary conversion of open space land to high density urban uses, thereby protecting against the resultant adverse impacts, such as: disturbance of wetlands and wetlands-type environment; destruction of wildlife habitat, including that of endangered and protected species; diminishing the ecological health of San Francisco Bay; hazards relating to geology, landfill, flooding, and earthquakes; destruction of scenic beauty; air, noise, and water pollution; increases in traffic on freeway, city streets, and intersections to unacceptable levels; rise

in housing costs and subsequent displacement of low-income people from contiguous neighborhoods in West Berkeley; and other demonstrated consequences of overly dense urban development.

Section 2: Purpose

The purpose of this ordinance is to establish policies and uses which:

(a) provide special protection to the unique and irreplaceable San Francisco Bay shoreline ecology, including, but not limited to, seasonal ponds, wetlands, mudflats, meadows, beaches, marshes, creeks, and tidelands;

(b) protect the open space and enhance the recreational uses and low density character of the entire waterfront area;

(c) protect and preserve views from the waterfront to the rest of the city, and from the rest of the city to the waterfront;

(d) guarantee and maximize access to the shoreline area by citizens of Berkeley and the State of California and guarantee that a continuous shoreline corridor or esplanade at least 100 feet wide shall be dedicated to the public for access by pedestrians, the disabled, and bicylists; provided, however, that such access shall not damage the delicate ecology of the area; and

(e) ensure that any development in the waterfront area occurs in a prudent manner, while protecting the City's residents from overly dense urban development in areas which are ecologically fragile and/or irreplaceable.

Section 3: Policies

(a) Meadow.

That area of the Berkeley Waterfront bounded by the freeway on the east, by the south sailing basin on the south, by Marina Boulevard on the west, and by the north sailing basin and by the northern edge of Virginia Street (as extended west to the Bay) on the north, commonly known as the Meadow, shall be retained as open space, except as provided in Section 3(c)(4) below. Open space uses which do not require the construction of structures on the Meadow may be allowed on the Meadow, provided that such

uses are consistent with the findings, purposes, and policies stated above, and provided further that any adverse environmental impacts by satisfactorily mitigated on site.

(b) Brickyard and Beach.

That peninsular portion of the Berkeley Waterfront south of the Meadow to Emeryville, commonly known as the Brickyard, and that the water's-edge portion of the waterfront south of University Avenue, commonly known as the Berkeley Beach, shall be retained as open space, except that a nature interpretive center of no more than one story, with a height of no more than 20 feet above current ground level, and with an area of no more than 5,000 square feet of floor space may be constructed on the Brickyard. Open space uses which do not require the construction of structures on the Brickyard and Beach may be allowed on the Brickyard and Beach, provided than such uses are consistent with the findings, purposes, and policies stated above, and provided further than any adverse environmental impacts be satisfactorily mitigated on site.

(c) North Beach Strip and Horse Barns.

(1) That portion of the Berkeley Waterfront north of the Meadow, east of the Bay, and south of Gilman Street, commonly known as the North Basin Strip, and that portion of the Berkeley Waterfront north of Gilman Street, east of the Bay, and south of the Albany city line, commonly known as the Horse Barns area, shall be designated for development.

(2) The total amount of development allowed in this area may not exceed 565,000 square feet. No building may be constructed which exceeds two stories, or which exceeds 25 feet in height above the current (1986) ground level, except that up to 50,000 square feet of this amount of development may be placed in a third story, in a building or buildings not to exceed 35 feet in height above the current (1986) ground level, if the appropriate city design review board determines that a plan which includes such increase in height is desirable both for aesthetic reasons and to carry out the policies set forth above. Permitted uses in this area are limited to the categories of uses for this area set forth in the draft Waterfront Specific Plan of May 9, 1986, (which

categories include lodgings, conference center, restaurants, retail shops, recreational uses, and open space uses) plus buildings appurtenant to any open space use of the Meadow or Brickyard.

(3) The above-described development may be allowed only if the landowner or developer establishes that any adverse environmental impacts, including, but not limited to, those described in the June 1986 draft Environmental Impact Report, including, but not limited to, traffic, geology, wetlands, and endangered-species problems, will be satisfactorily solved or mitigated. Any adverse impacts as to wetlands shall be mitigated on property within the Berkeley waterfront, as defined above.

(4) If the landowner or developer demonstrates to the City's satisfaction that it is economically and legally infeasible to place all the development described in Section 3(c)(2), above, in a location north of Virginia Street (as extended westward), then the City may permit some of that development to be situated south of Virginia Street (as extended westward) provided: (1) that the amount of development (including structures and parking) located south of Virginia Street shall be kept to a minimum; (2) that any such development south of Virginia Street may occupy a site of no more than 12 acres of land; (3) that this development shall be located as far north and as far east on the Meadow as possible, and shall not encroach on that portion of the Meadow which is west of the North Basin Strip shoreline, if that line were extended due south to University Avenue; and (4) that the above-described development may be allowed only if the landowner or developer establishes that any adverse environmental impacts, including, but not limited to, those described in the June 1986 draft Environmental Impact Report, including, but not limited to, traffic, geology, wetlands, and endangered-species problems, will be satisfactorily solved or mitiaged. Any adverse impacts as to wetlands shall be mitigated on property within the Berkeley waterfront, as defined above.

"Economically and legally infeasible" is defined as follows: the landowner or developer must establish that there was a lease between it and the Pacific Racing Association which existed as of January 1, 1986; that said lease did and does render it legally and financially infeasible to construct the approved development on

the North Basin Strip north of Virginia Street, that the lease represents the sole reason for any inability to develop prior to the lease's expiration date, and that said lease cannot reasonably be modified at a reasonable cost. "Reasonable cost" means that the cost or fair market value of modifying the lease, as determined by the City, is such that it would not make the contemplated construction north of Virginia Street financially infeasible.

"To the City's satisfaction", as used in this subsection, is defined as follows: the City Council must find, by a vote of more than ⅔ of the Council members, based on a preponderance of the evidence, that such development in this location is necessary to carry out the purposes and policies of this ordinance.

Section 4: Programs and Time Limits

Within six (6) months of the effective date of this ordinance the City of Berkeley's Master Plan, Zoning Ordinance, and Waterfront Specific Plan shall be amended to incorporate and conform to the policies contained in this ordinance. However, the policies contained in this ordinance shall be in force as soon as the ordinance takes effect. These policies shall be implemented in a manner which avances the findings and purposes listed above.

Section 5: Constitutionality

This ordinance is not intended to authorize, and shall not be construed as authorizing, the City of Berkeley to exercise its power in a manner which will take or damage private property for public use. This ordinance is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Section 6: Severability

If any portion of this ordinance is hereafter determined to be invalid, all remaining portions of this ordinance shall remain in full force and effect, and to this extent the provisions of this ordinance are severable.

Section 7: Amendment

No part of this ordinance shall be amended or repealed, except by a vote of the people.

Section 8: Effective Date

This ordinance shall take effect immediately upon its passage by the voters of the City of Berkeley.

Berkeley City Attorney Analysis of Measure Q

The proposed ordinance, of adopted, would regulate development on certain areas of the Berkeley Waterfront currently owned by Santa Fe Land Improvement Company ("Santa Fe") in the following manner:

1. Prohibit the construction of any structures on the area commonly known as the Meadow bounded by the freeway on the east, by the South sailing basin on the south, by Marina Boulevard on the west and by the north sailing basin and the northern edge of Virginia Street (as extended West to the Bay) on the north unless the City Council determines, by a two-thirds vote, based on a preponderance of the evidence, that development north of Virginia Street is legally and financially infeasible because of the existence of a lease entered into between Santa Fe and the Pacific Racing Association as of January 1, 1986, which may preclude any such development until 1997. In such case the City may permit the minimum development necessary to address any such legal constraints imposed by the lease as long as any such development is located as far as possible to the north, does not encroach west of the North Basin Strip shoreline if that line were extended due south to University Avenue and does not occupy more than twelve acres of land.

2. Prohibit the construction of any structures on the peninsula area commonly known as the Brickyard south of the Meadow and on the water's edge area commonly known as the Berkeley Beach except for a nature interpretive center of no more than one 20-foot story containing no more than 5,000 square feet of floor space.

3. Require that, except as provided for, the Meadow, Brickyard and Berkeley Beach be retained as open space. Open space uses which do not require construction of structures are permitted to the extent they are consistent with the purposes of the ordi-

nance such as the protection of San Francisco Bay Shoreline ecology.

4. Authorize up to 565,000 square feet of development in the area north of the Meadow, east of the Bay, South of Gilman Street, commonly known as the North Basin Strip and that area north of Gilman Street, east of the Bay, and south of the Albany City line commonly known as the Horse Barns area. The development must be limited to the categories of uses set forth in the draft Waterfront Specific Plan of May 9, 1986 (e.g. lodgings, conference center, restraurants, retail shops, recreational uses and open space uses) and the buildings are limited to two stories unless a third story is permitted by a City design review board for aesthetic reasons or to carry out the purposes of this ordinance.

5. Require, within six months of passage of the ordinance, that the City's Master Plan, Zoning Ordinance and Waterfront Specific Plan be amended to incorporate the policies contained in the ordinance.

Under the City Plan in effect on August 8, 1986, the waterfront is designated as "unclassified" and, thus, any development may be approved upon a finding of no detriment by the Board of Adjustments or the City Council on an appeal. As of August 8, 1986, the date this analysis was prepared, the City is completing a three-year planning process in which it has tentatively approved a plan for the waterfront and is in the process of receiving public comments on the Environmental Impact Report which the City commissioned regarding the proposed plan. This ordinance differs from the current proposed plan in one major respect. The current proposed plan calls for public acquisition of the Brickyard, the Berkeley Beach and 50 acres of the Meadow, whereas this ordinance requires that these areas remain as open space, irrespective of whether the City actually buys the land from Santa Fe. Public acquisition of any of the land required to remain open space would be permissable.

This ordinance differs from the initiative ordinance on the waterfront in two major respects:

(a) it allows construction of structures on up to twelve acres of the Meadow east of the North basin shoreline extended due south

if the City determines that development in the North Basin Strip is legally and financially infeasible because of a lease existing as of January 1, 1986 between Santa Fe and the Pacific Racing Association;

(b) it limits development in the North Basin Strip to 565,000 square feet, imposes a height limit on buildings constructed, and limits the category of uses permitted to those set forth in the City's draft waterfront specific plan of May 9, 1986. The initiative ordinance leaves these issues to be decided by the City Council. As of August 8, 1986, the City Council proposes to authorize a level of development which is within the limits imposed by this ordinance.

If both measures pass, the one which receives the most votes will supersede any conflicting provisions of the other.

Financial Implications

Additional administrative costs to revise the City's plans and zoning ordinance in an amount unknown at this time.

Argument in Favor of Measure Q

Measure Q preserves maximum open space and the natural environment of our Waterfront. This measure supports the waterfront plan which was developed over a two year planning process involving extensive community participation. The SIERRA CLUB and leading environmentalists support the plan which is sensitive to the natural features of the site and which encourages the creation of an East Bay Shoreline Park.

Measure Q:

**Requires permanent open space zoning for the irreplaceable natural resources of the Brickyard, Beach and Meadow.

**Assures public access and increased recreational opportunities.

**Limits traffic congestion on I-80 and West Berkeley streets by restricting development on the Waterfront.

In addition, Measure Q is the ONLY waterfront plan on the ballot that:

**Places an absolute cap on all development on the privately owned lands at the Waterfront.

**Limits heights of new structures to protect views of the Bay and the Berkeley Hills.

**Assures design review of any new structures on the Waterfront.

**Is supported by the SIERRA CLUB.

Measure Q is the legally defensible plan for assuring that a maximum amount of open space will be preserved on the Waterfront, now and forever.

Santa Fe Land Improvement Company, the waterfront owner has repeatedly sued the City of Berkeley to force approval of its plan for FOUR AND A HALF MILLION SQUARE FEET of building, up to TEN STORIES IN HEIGHT. Overdevelopment by Santa Fe would result in massive traffic jams, destruction of the natural ecology and views, and displacement of low and moderate income residents and community business people from West Berkeley. Measure Q offers the best legal defense against Santa Fe's well financed assault on our waterfront environment and the wishes of the citizens of Berkeley. Please join the SIERRA CLUB and other leading invironmentalists in supporting Measure Q.

s/Veronika Fukson, Vice-Mayor
s/Jim Liljenwall, Chair, Waterfront Commission
s/Toni Mester, Berkeley Coordinator, Sierra Club East Bay Shoreline Park Task Force
s/Loni Hancock, Waterfront Commission
s/Edward Bennett, Exec. Comm. Bay Chapter of the Sierra Club

Rebuttal to Argument in Favor of Measure Q

Measure Q allows Santa Fe to build a giant hotel and conference center, twice the size of the controversial Golden Bear

complex, on Berkeley's waterfront Meadow. The restrictions in Measure Q are not enforceable. If Q passes, this hotel can be built.

Measure Q is an environmental disaster. This 450-room hotel will occupy 12 acres of the Meadow's east end, the most ecologically sensitive area of the waterfront. An irreplaceable wetland habitat will be destroyed. Traffic congestion on the waterfront and in West Berkeley will worsen dramatically. Panoramic views of the Bay will be obstructed.

With a 450-room Santa Fe hotel on one side and the 400-room Marriott Inn on the other, development advocates will want to commercialize the remaining Meadow. Any open space left could end up a private park for hotel guests. Berkeley residents will lose access to their own shorefront.

Measure Q allows more development and taller buildings than the public wants. It locks in the large-scale development sought by pro-development planners, consultants, and politicians and ignores the community's desires. If passed, Measure Q could only be undone by a future ballot measure, no earlier than 1988.

Don't be deceived. Measure Q was placed on the ballot to allow large-scale development on the Meadow. Don't let pro-development politicians and planners turn our magnificent open space waterfront into a Miami Beach-by-the-Bay. Vote NO on Q.

Measure P, the citizens' initiative, will preserve our open space bayfront. Vote YES on P.

s/Councilmember John Denton, Attorney, Chair Council Waterfront Committee
s/Rosalind Lepawsky, Executive Director of Urban Care
s/Ruth Boyden, Early member of Berkeley Waterfront Advisory Board
s/Francis Violich, Professor of City Planning Emeritus UC Berkeley
s/Irv Rautenberg, Director Bayfront Conservancy Fund

Argument Against Measure Q

Measure Q gives Santa Fe the right to build a hotel and conference center, twice the size of the controversial Golden Bear complex, on Berkeley's waterfront "Meadow," the open field between the Marina and Interstate 80. Such a giant development would be an environmental disaster, would increase traffic congestion and pollution, and would obstruct panoramic views of the Bay.

The City's waterfront environmental Impact Report identifies the seasonal ponds on the Meadow as a migratory bird habitat. Numerous waterbirds frequent the site, including the endangered brown pelican and the California least tern. Most of these ponds are on the Meadow's east end, exactly where Measure Q would allow Santa Fe's real estate corporation to build its hotel. This ecologically sensitive habitat cannot be replaced, not its loss mitigated. If Measure Q passes and the hotel is built, this wildlife habitat would disappear. So would the panoramic views and the waterfront's calming and restorative qualities.

Under Measure Q, development could cover 12 acres of the Meadow. More land would be eaten up by parking lots and roads. Eventually there would be pressure to make the hotel even larger. (The Marina Marriott recently was allowed to build a four-story addition.) Any remaining Meadow open space would end up a private park for hotel guests, and local residents would lose access to the bayfront.

Don't be fooled. Measure Q was placed on the ballot to deceive voters and to defeat Measure P, the citizens initiative that preserves the entire Meadow. 3,600 Berkeleyans placed Measure P on the ballot to protect the waterfront. Don't give away the beauty and integrity of Berkeley's waterfront. Vote No on 'Q'. Vote YES on 'P'.

s/City Councilmember John Denton, Chair Council Waterfront Committee

s/Albert Lepawsky, President Berkeley Bayfront Conservancy Fund

s/Gerda Miller, Convenor Berkeley Gray Panthers

s/Irv Rautenberg, Director Berkeley Bayfront Conservancy Fund

s/Charles "Ozzie" Osborne, Elmwood Preservation Activist

Rebuttal to Argument Against Measure Q

Measure Q was written by the Sierra Club waterfront taskforce to fix the mistakes of Measure P. The Sierra Club taskforce originated the plan to preserve the Meadow and the Brickyard as open space and place all development along the freeway north of the Meadow; to claim that it wants to deceive voters is ridiculous.

Measure Q no more allows Santa Fe to build a hotel-conference center on the Meadow than does Measure P. Both measures oppose any such development. If Santa Fe is able to build or restrict access on any part of the Meadow, it will be in spite of these measures and only if court decision, unwisely, require it.

Measure Q faces up to the fact that Santa Fe and its team of lawyers will continue to try to pressure the city into allowing massive waterfront development—up to 4½ million square feet of it, with buildings ten stories high. Measure Q enacts the strongest possible legal defense to such pressure.

Measure Q repairs another defect in Measure P by placing an absolute limit on the extent and height of buildings. Without such limits, the section along I-80 north of University Avenue could someday look like another Emeryville.

It's too bad that environmentalists disagree on the best way to preserve our waterfront. The Sierra Club taskforce would not have written this ballot measure unless it was necessary.

IT IS NECESSARY. VOTE YES ON MEASURE Q.

s/Edward Bennett, Executive Committee, San Francisco Bay Chapter, Sierra Club

s/Don Forman, Conservation Chair, San Francisco Bay Chapter, Sierra Club

s/Helen King Burke, Director, EBMUD

s/Jerry Fillingim, Labor Activist, City Council Candidate

s/Matt Crawford, Member, Waterfront Commission

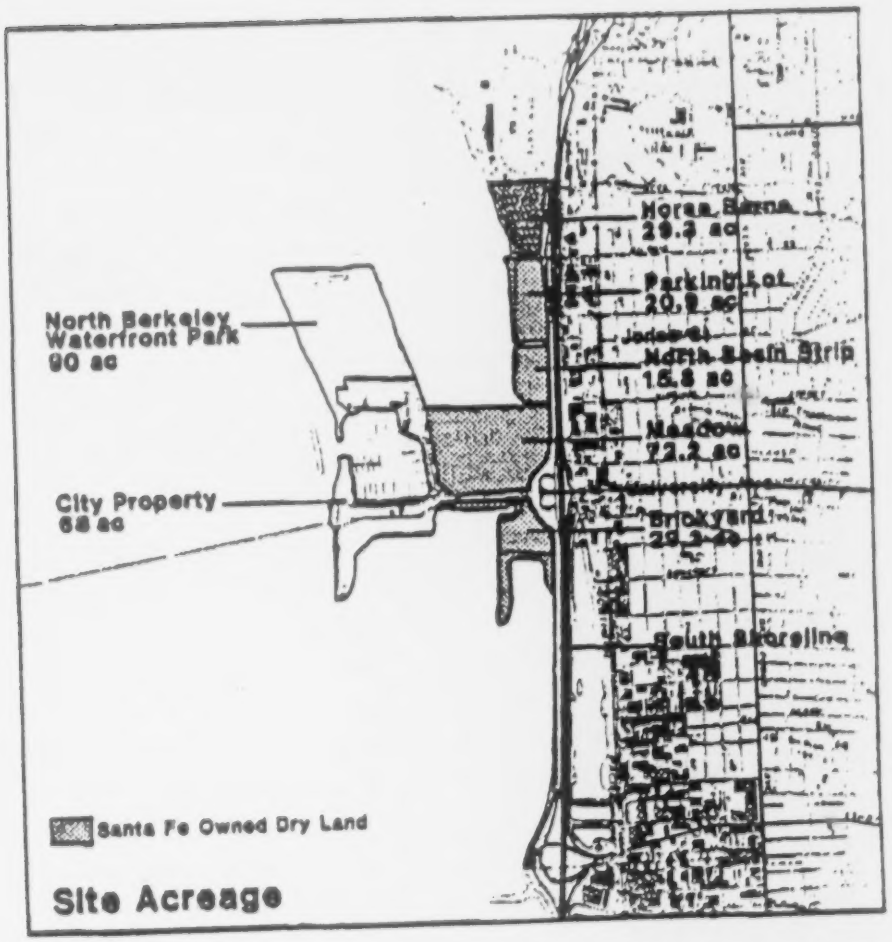
North Berkeley
Waterfront Park
90 ac
City Property
68 ac
Horse Barns
29.2 ac
Parking Lot
20.9 ac
Jackson
North Basin Strip
18.8 ac
Meadow
72.2 ac
Brickyard
29.3 ac
South Shoreline
Santa Fe Owned Dry Land
Site Acreage
Berkeley Waterfront
0
2000
4000

EXHIBIT A